United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

75-7303

No. 75-7303

In The
United States Court of Appeals
For the Second Circuit

B

MICHAEL FERGUSON, a minor, by THERESA FERGUSON, his parent, and on behalf of others similarly situated

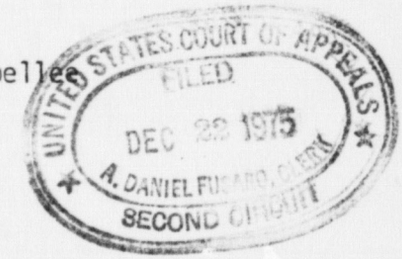
P/S

- Plaintiff - Appellant

vs

ARMAND ROY, Individually and as Mayor of the Town of Enfield, Connecticut

- Defendant - Appellee



SUPPLEMENTAL BRIEF OF APPELLANT

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ISSUE PRESENTED

Did the failure of the District Court to rule on the plaintiff's motion to certify a class action render moot his appeal of the dismissal of his claim that the denial to minors of the right to speak at the Enfield annual open town budget hearing pursuant to the Enfield Town Charter violates his and all other members of the represented class' rights under the First and Fourteenth Amendments to the United States Constitution?

ARGUMENT

THE FAILURE OF THE DISTRICT COURT TO CERTIFY A CLASS ACTION DOES NOT RENDER THE ISSUES RAISED IN THIS APPEAL MOOT

A. A Suit Brought As A Class Action Does Not Lose Its Representative Characterization Because Of The Failure Of The District Court To Certify It Prior To Its Disposition On The Merits

Rule 23(e) of the Federal Rules of Civil Procedure (hereinafter, F.R.C.P.) provides that, "(A) class action shall not be dismissed or compromised without the approval of the court...."

As several courts have demonstrated, "(T)he rule is from the time of the filing of the complaint until Rule 23 determination by the court, an action is assumed to be a class action for purposes of dismissal or compromise". Washington v. Wyman, 54 F.R.D. 266, 271 (1971), Frost v. Weinberger, 375 F. Supp. 1312 (1974), Torres v. New York State Department of Labor, 318 F. Supp. 1313 (S.D.N.Y. 1970), Gaddis v. Wyman, 304 F. Supp. 713, 715 (1969), Philadelphia Electric Co. v. Anaconda American Brass Co., 42 F.R.D. 324, 326 (1967) and Berger v. Purolator Products, Inc., 41 F.R.D. 542 (1966).

In Gaddis, supra., the court quoted the Advisory Committee's note on the 1966 amendments to Rule 23 (in support) that"...(a)n action commenced as a class action retains that character until a court finds otherwise...." Id. at 715:

> "An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a

> stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action shoud be stripped of its character as a class action. Advisory Committee's Notes reprinted at 39 F.R.D. 69, 104 (1966)(Emphasis added). Id.

The Gaddis court concluded, "(T)herefore, no class determination having been made a class action must be presumed to have existed...." Id.

> This result seems sound in as much as a contrary conclusion would put an undue premium on early settlements to avoid the application of Rule 23 (e) and even might encourage collusion during the period before the class issue is resolved ("Problems of Giving Notice in Class Actions"), Arthur Miller, 58 F.R.D. 313, 332.

See also Thomas v. Clarke, 54.F.R.D. 245 (1971), Gatling v. Butler, 52 F.R.D. 389 (1971).

In the present action there was no determination in the lower court as to whether the case could proceed as a class action. Arguendo, the plaintiff, having reached his majority, is no longer a proper representative of the class. However, as in Gaddis, the plaintiff was a proper representative of the class when the action was commenced. "To say that the whole action is mooted simply because it may be moot as to the named plaintiff would be contrary to the express purpose of Rule 23(e)...." Gaddis, at 715.

Similarly in La Reau v. Manson, 383 F. Supp. 214 (1974) the court reached the same conclusion as the Gaddis court did where the named plaintiffs in class action challenging conditions in a correctional institution had been transferred at the time of trial. The court noted that it had previously

> held that a class action could be maintained even though the case may have been mooted as to the named plaintiff in the interim between the filing of the action and the Fed. R. Civ. P. 23(c)(1) determination. at 217.

In two recent cases on the question of mootness the Supreme Court has strongly implied that had the suits been brought as class actions a different decision would have been compelled. In De Funis v. Odegaard, 416 U.S. 312, 95 S. Ct. 1704, (1974) the Court specifically noted that "De Funis did not cast his suit as a class action" (at 94 S. Ct. 1706) and went on to hold that since the plaintiff had been accorded the relief he desired the case no longer presented an issue for the Court to decide. Similarly in Preiser [illegible] Kirk, 95 S.Ct. 2313 (1975) the Court found the action moot where relief had been accorded the plaintiff and the matter was not a class action. The court intimated and Justice Marshall specifically stated in his concurring opinion that there would have been a different result on mootness were the case a class action. Cf. Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973).

B. The Doctrine Of Mootness Is Not Invoked Where There Is A Voluntary Cessation Of Allegedly Illegal Conduct Or Where A Case Presents A Question Which Is Capable Of Repetition, Yet Otherwise Evades Review.

It is clear that any action regarding a recurrent problem presents a justiciable issue despite the fact that the problem is not presently at issue. Thus in Allen v. Hickle, 424 F. 2d 944 (1970) an

action to enjoin the construction and maintenance of a chreche (manger scene) on federal parkland was held not to be moot despite the fact that the Christmas season had passed. The court's holding was based on the fact that the problem was going to occur the following season. Women Strike for Peace v. Hickel, 420 F. 2d at 604 (1969), Friend v. United States, 388 F. 2d 579, 581 (1967). Vaughan v. Bower, 313 F. Supp. 37 (D. Ariz. 1970, aff'd 91 S.Ct. 139, 400 U.S. 884 (1970). Similarly, there is every indication that the past refusals to allow the plaintiff to speak will occur at the town's 1976 meeting and therefore the issue is not moot simply because the time of the meeting has passed or the plaintiff, arguendo, no longer represents the class of persons who are denied the opportunity to address the meeting.

It was noted in Alton & Southern Railway Co., et al. v. International Association of Machinists & Aerospace Workers, 463 F. 2d 872, 877 (1972) that " a Federal Court is without power to decide a case that is moot to the extent of constitutional disability". (emphasis added). In Sibron v. New York, 392 U.S. 40, 57, 88 S. Ct. 1889 (1968) the Supreme Court defined disability as a case which [is]:

> 'abstract, feigned or hypothetical,' when it seeks an 'advisory' opinion because it lacks the 'impact of actuality', or when it lacks the concretness and the kind of adversariness that is assured when a party has a 'substantial stake' in the controversy which assures a presentation with requisite diligence, and indeed, 'fervor'. Alton, supra. at 877.

A constitutional disability refers to the nonexistence of a "case or controversy" required for the exercise of judicial power under Article III of the Constitution. De Funis, supra., at 1705-1706. However, the Court affirmed two long-standing doctrines that bar the invocation of mootness. One is that the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." See United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S. Ct. 894, 897 (1953) and other cited cases in De Funis, supra., at 1706. This doctrine was held not to apply in De Funis, supra. at 1707 because there was no reasonable expectation that the wrong would be repeated, citing U.S. v. W.T. Grant Co., supra. See Short v. Murphy, 512 F. 2d 374, 376 (1975). In the instant case, the wrong claimed will certainly be repeated and will affect the class of citizens the plaintiff represented when the case was initiated.

Therefore, the case at bar is more analogous to the second doctrine affirmed by the De Funis Court as barring mootness; those cases which present questions "capable of repetition, yet evading review", citing Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515, 31 S.Ct. 279, 283 (1911) and Roe v. Wade, 410 U.S. 113, 125, 93 S. Ct. 705, 713 (1973). See also, Johnson v. New York State Education Department, 409 U.S. 75, 76, 93 S. Ct. 259 (1972) (Marshall, J., concurring); Moore v. Ogilvie, 394 U.S. 814, 816, 89 S. Ct. 1493 (1969), Squillacote v. Graphic Arts International Union (GAIU) Local 277, 513 F. 2d 1017, 1023 (1973), and Frost v. Weinberger, supra. Since De Funis was not brought as a class action, the allegedly unlawful admission process were not capable of affecting him as he was graduating from law school. But the denial of the constitutional

right to speak to the class of persons the plaintiff represents at annual open town budget hearings is not only capable of being repeated but is a certainty.

While the plaintiff brought this action prior to this eighteenth birthday he will be eighteen by the time of the next town meeting and therefore eligible to speak as an elector. Although the action will then, arguably, be moot as to him, this is a situation in which rigid standards of mootness should not apply. Thus in Roe v. Wade, 410 U.S. 113, 93 Ct. 705 (1973), the Court held that "(p)regnancy provides a classic justification for nonmootness". The La Reau court's decision was based in part on considerations similar to Roe, supra. In La Reau the court felt that due to the high turnover at the correctional facility actions such as the one before it could never be adjudicated if strict standards of standing were applied.

Where a plaintiff's standing depends on a short - lived status such as pregnancy in Roe, brief detention in a correctional institution in La Reau or the time between a minor's desire to speak at a town meeting and his majority, that status should not be used to avoid a decision on an issue "capable of repetition, yet evading review". Id.

CONCLUSION

A suit brought as a class action does not lose its representative characterization because of the failure of the District Court to certify the class prior to its disposition on the merits. Nor should the doctrine of mootness be invoked where a case presents a question which is capable of repetition, yet which would otherwise evade review. For the aforesaid reasons this appeal should

not be held to be moot.

Respectfully submitted,

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CERTIFICATION OF SERVICE

This is to certify that on the day of November, 1975, a copy of the foregoing was mailed postage prepaid to John Adams, Esq., 92 North Main Street, Enfield, Connecticut, attorney for the Appellee herein.

_____
FRANK COCHRAN